

UNITED STATES OF AMERICA

v.

Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211

)
) Government *in camera* and *ex parte*
) Motion for Authorization of Redactions of
) Department of State Records under
) MRE 505(g)(2) and RCM 701(g)(2)
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14 September 2012

RELIEF SOUGHT

COMES NOW the United States of America, by and through undersigned counsel, and respectfully requests this Court: (1) consider this motion *in camera* and *ex parte* under Military Rule of Evidence (MRE) 505(g)(2) and Rule for Courts-Martial (RCM) 701(g)(2); and (2) authorize redactions of portions of Department of State (hereinafter "Department") documents under MRE 505(g)(2) and RCM 701(g)(2) that are neither favorable to the accused and material to guilt or punishment, relevant and necessary for production under Rule for Courts-Martial (RCM) 703(f), subject to production under the Court's Order dated 19 July 2012, nor "necessary to enable the accused to prepare for trial" under MRE 505(g)(2).

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the prosecution has the burden of persuasion on any factual issue the resolution of which is necessary to decide the motion. RCM 905(c)(2). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

FACTS

On 10 May 2012, the defense requested that the Court compel the discovery and/or production of Department records relating to the accused and/or WikiLeaks. The defense requested records related to the Chiefs of Mission, WikiLeaks Persons at Risk Group, Mitigation Team, and the Department's reporting to Congress. On 24 May 2012, the prosecution opposed, in part.

On 4 June 2012, the Court ordered the prosecution to produce a witness or witnesses to testify as to the Chiefs of Mission, WikiLeaks Working Group, Mitigation Team, the Department's reporting to Congress, and the WikiLeaks Persons at Risk Group. On 7 June 2012, three Department witnesses, specifically Ms. Marguerite Coffey, Ms. Rena Bitter, and Ms. Catherine Brown, testified as to the above material.

On 7 June 2012, the defense requested that the prosecution disclose the following material: (1) written assessments produced by the Chiefs of Mission used to formulate a portion of the draft damage assessment completed in August of 2011; (2) written Situational Reports produced by the WikiLeaks Working Group between roughly 28 November 2010 and 17 December 2010; (3) written minutes and agendas of meetings by the Mitigation Team; (4)

Information Memorandum for the Secretary of State produced by the WikiLeaks Persons at Risk Group; (5) a matrix produced by WikiLeaks Persons at Risk Group to track identified individuals; (6) formal guidance produced by WikiLeaks Persons at Risk Group and provided to all embassies, including authorized actions for any identified person at risk; (7) information collected by the Director of the Office of Counter Intelligence and Consular Support within the Department regarding any possible impact from the disclosure of diplomatic cables; and (8) any prepared written statements for the Department's reporting to Congress on 7 and 9 December 2010.

On 7 June 2012, the prosecution requested thirty days to determine whether the above records exist. The Court granted the prosecution's request. The Court ordered the prosecution to notify the Court by 9 July 2012 whether such records exist and to file a supplemental response to the Defense Motion to Compel Discovery for those records that do exist.

On 9 July 2012, the prosecution notified the Court which of the above records exist and filed a supplemental response to the Defense Motion to Compel Discovery for those records that do exist. The prosecution specifically requested the Court deny production of Personally Identifiable Information (PII) of persons negatively affected by the accused's alleged disclosures.

On 19 July 2012, the Court ordered the prosecution to search all of the above information for material required to be disclosed to the defense that is material and favorable to the defense. By 14 September 2012, the Court ordered the prosecution to disclose, *inter alia*, the following Department records to the defense: (1) information that forms the basis of the sentence aggravation and for an expert opinion; (2) the underlying raw data forming the basis for the Department damage assessment; (3) any records of the timing of relevant group meetings and how long the meetings lasted; (4) the PII of any persons identified in the newspaper article the defense presented to the Court that is maintained by the Department as persons negatively affected; and (5) any information discoverable under Brady v. Maryland, 373 U.S. 83 (1963). The Court granted the prosecution's request to exclude PII of persons negatively affected by the accused's alleged disclosures, except for those persons identified in the defense-proffered newspaper article.¹

On 14 September 2012, the prosecution made available to the defense for inspection all Department documents responsive to the above Court Order, or otherwise discoverable, for which redactions under RCM 701(g)(2) or MRE 505(g)(2) are not sought (i.e., approximately 6500 pages). For any captioned or otherwise particularly sensitive documents (as explained below, to include NODIS, EXDIS, Roger Channel, DS Channel, or DS-controlled) for which redactions are not sought, the Department will make the documents available to the defense counsel and their security experts to inspect at the Department until the end of the court-martial. For all remaining documents for which redactions are not sought, the prosecution will deliver these documents to the defense by 21 September 2012. The defense counsel and their experts

¹ The defense proffered that the newspaper article identified a person who was characterized by the Department as a Person-at-Risk, yet none of the persons identified in the article confirmed they were contacted by the Department or characterized as a Person-at-Risk. Instead, the article identified persons named in compromised cables who personally did, or did not, believe they were at-risk by being identified in purported cables. In fact, the article explicitly states that "endangered individuals would have been prioritized" by the Department.

are not authorized to share the information contained within these documents or their notes with the accused.

The attached Memorandum for Record details the timing of relevant group meetings and how long those meetings lasted, consistent with the Court's Order dated 19 July 2012. See Enclosure 5.

The prosecution submits the remaining documents that it identified as containing information responsive to the above Court Order or otherwise discoverable for *in camera* review under RCM 70I(g)(2) or for limited disclosure under MRE 505(g)(2). These documents are segregated into two categories of proposed redactions: (1) redactions of PII consistent with the Court Order dated 19 July 2012; and (2) redactions of particularly sensitive and unresponsive information within other documents. See Enclosures 1-2. The first category of documents (PII) is identified with a coversheet titled "Bucket #2" and consists of approximately 750 pages. The second category of documents (sensitive and unresponsive) is identified with a coversheet titled "Bucket #3" and consists of approximately 250 pages. The proposed redactions for both categories are penciled in brackets within the respective documents. See id.

The first category of proposed redactions is for PII consistent with the Court Order dated 19 July 2012. The proposed redactions include any information that could be used by another to identify a specific individual. The Department considered many factors in defining PII for persons negatively affected by the accused's alleged disclosures, to include the availability of the purported cables to the public because of the disclosures, the intelligence capabilities of other actors, and any particularly unique-identifying information. See Enclosure 3. Should the Court authorize the redactions for those documents in this category of proposed redactions, the prosecution will disclose those documents to the defense in classified discovery. The defense counsel and their experts are not authorized to share the information contained within the documents or their notes with the accused.

The second category of proposed redactions is for particularly sensitive information within other documents. Those documents either (1) are captioned "NODIS" (not for distribution beyond the intended recipient) or "EXDIS" (exclusive distribution to officers with an essential need to know), (2) are communications via "Roger Channel" (typically sent to or by the Department's Bureau of Intelligence and Research) or "DS Channel" (for distribution to the Bureau of Diplomatic Security (DS) of sensitive security), or (3) contain DS-controlled information. See Enclosure 4. Should the Court authorize the redactions for those documents in this category of proposed redactions, the Department will make the redacted documents available to the defense counsel and their security experts to inspect at the Department until the end of the court-martial. The defense counsel are only authorized access to inspect the redacted documents with their security experts present. The defense counsel and their experts are authorized to take notes, and those notes will be classified at the same level as the redacted document(s). All notes will be sealed by the defense expert, and stored at the Department for defense's use. The defense counsel and their experts are not authorized to share the information contained within the documents or their notes with the accused.

A subset of documents in the first category (PII) also either are captioned "NODIS" or "EXDIS", or are communications via "Roger Channel" or "DS Channel." Should the Court

authorize the redactions for those documents, the Department will make those redacted documents available for inspection, consistent with the second category of proposed redactions.

Based on the sensitivity of the documents, the Department will accommodate the Court in its review of the documents, to include making a Department facility available.

Jonathan Davis is the point of contact within the Department's Office of the Legal Adviser and will coordinate the documents being available anytime the Court would like to review the material. Mr. Davis may be contacted at (b) (6).

The Department acknowledges that the documents must be made part of the appellate record. Accordingly, and because the document contains sensitive information, the Department requests the documents be permanently stored at its facility.

WITNESSES/EVIDENCE

The prosecution does not request any witnesses be produced for this motion. The prosecution requests that the Court consider the enclosures listed at the end of this motion.

LEGAL AUTHORITY AND ARGUMENT

RCM 701(g)(2) states that "[u]pon a sufficient showing the military judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate." RCM 701(g)(2). The rule continues that "[u]pon motion by a party, the military judge may permit the party to make such showing, in whole or in part, in writing to be inspected only by the military judge." *Id.*; see also Appellate Exhibit XXX ("RCM 701(g)(2) does authorize the Court to allow *ex parte* showings by either party when moving the Court to restrict or limit discovery"); *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999) (under RCM 701(g)(2), "the military judge has such tools as *in camera* reviews, and protective or modifying orders at his disposal").

If classified information is at issue in a court-martial, then the United States may agree to disclose the classified information to the defense under a protective order. See MRE 505(g)(1). Additionally, the United States may motion the Court to "authorize (A) the deletion of specific items of classified information from documents to be made available to the [accused], (B) the substitution of a portion or summary of the information for classified documents, or (C) the substitution of a statement admitting relevant facts that the classified information would tend to prove." MRE 505(g)(2). The military judge "shall authorize" these alternative forms, unless she determines "the disclosure of the classified information itself is necessary to enable the accused to prepare for trial." *Id.* If a motion is filed under MRE 505(g)(2), then upon request of the United States, the motion "shall" be considered by the military judge *in camera* and "shall not be disclosed to the accused." *Id.*

The procedures outlined in MRE 505(g)(1) and (2) apply when the United States voluntarily discloses information and does not withhold classified information under MRE

505(c). If the United States intends to withhold information under MRE 505(c), then the United States must move for an *in camera* proceeding under MRE 505(i)(2), obtain an affidavit demonstrating that disclosure of the information reasonably could be expected to cause damage to the national security under MRE 505(i)(3), and follow the notice procedures outlined under MRE 505(i)(4). See MRE 505(i). For the purposes of this filing, the Department, through the prosecution, is voluntarily disclosing portions of the documents and is not withholding any classified information under MRE 505(c) and MRE 505(i).

The prosecution reviewed the original classified information for information favorable to the accused and material to guilt or punishment, relevant and necessary, or responsive to the Court's Order. See RCM 701(a)(6); RCM 703(f); see also *Brady v. Maryland*, 373 U.S. 83 (1963). The prosecution reviewed the original documents and determined that many of them contained information that was favorable to the accused and material to guilt or punishment, relevant and necessary, or responsive to the Court's order. As stated above, the prosecution will make available for inspection, or produce in classified discovery, the majority of the responsive documents. For the documents which have redactions, as described above, the prosecution did identify discoverable information, and the prosecution voluntarily discloses the responsive portions of the classified material to the defense under MRE 505(g)(1) or (g)(2). The Department determined it would disclose the information with redactions under MRE 505(g)(2). The prosecution reviewed the redactions and determined that they accurately delete unresponsive material and provide adequate context.

The information contained within the original documents, which is redacted, does not meet the RCM 701(a)(6) or *Brady/Giglio* standards and therefore is not discoverable, nor is it material to the preparation of the defense to the extent relevant and necessary, relevant and necessary, or responsive to the Court's Order for production under RCM 703(f). Additionally, that information is not "necessary to enable the accused to prepare for trial" under MRE 505(g)(2). Therefore, the defense is not entitled to discovery of the redacted information.

Should the Court find the redacted information is discoverable under RCM 701(a)(6) or *Brady/Giglio*, relevant and necessary or responsive to the Court's Order for production under RCM 703(f), or is "necessary to enable the accused to prepare for trial" under MRE 505(g)(2), then the prosecution requests the opportunity to either: (1) address the Court's findings with the relevant government agency to determine whether a different alternative under MRE 505(g)(2) is appropriate and file that alternative with the Court, or (2) allow for the relevant government agency to claim a privilege under MRE 505(c) and the prosecution to move for an *in camera* proceeding under MRE 505(i).

The prosecution will not use any portion of the redacted information not disclosed to the defense during any portion of the trial. This includes rebuttal and rule of completeness if the defense introduces or references anything in the substitution

CONCLUSION

The prosecution respectfully requests this Court: (1) consider this motion *in camera* and *ex parte* under MRE 505(g)(2) and RCM 701(g)(2), and (2) authorize redactions of portions of Department documents under MRE 505(g)(2) and RCM 701(g)(2) that are neither favorable to

the accused and material to guilt or punishment, relevant and necessary for production under RCM 703(f), subject to production under the Court's Order dated 19 July 2012, nor "necessary to enable the accused to prepare for trial" under MRE 505(g)(2).



J. HUNTER WHYTE
CPT, JA
Assistant Trial Counsel

5 Encls

1. Department Documents w/ PII Redactions (classified "SECRET//NOFORN") [not attached] (*ex parte*)
2. Captioned Department Documents w/ Redactions (classified "SECRET//NOFORN") [not attached] (*ex parte*)
3. Department Memorandum (Kozak), dated 14 September 2012 (*ex parte*)
4. Department Memorandum (Heinemann), dated 14 September 2012 (*ex parte*)
5. MFR, Timing and Length of Relevant Group Meetings, 14 September 2012